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IN THE

Supreme Court of the United States

No. 1603

MALCOLM B. DEVERS,

Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

The Respondent District of Columbia National Bank prays this court deny the Petition for a writ of certiorari to review the judgment entered by the Supreme Court of Appeals of Virginia on the 19th day of January, 1970.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case with the following exceptions.

On page 6 of his Brief, petitioner makes a statement that in its ruling on the case the Court "made no finding on Count II." From pages 6 and 7 of that portion of the transcript reporting the Trial Court's opinion, it is quite clear that the Court accepted the reasoning of counsel for petitioner (in which respondent entirely concurs) that if respondent was entitled to judgment on Count I "there will be no cause of action existing on the contract of guarantee." Furthermore in the Court's final Order the Court plainly held that "being entitled to recover upon Count I as aforesaid, said plaintiff is not entitled to recover on Count II."

Petitioner's Statement of the Case ignores entirely the largely uncontradicted testimony of one witness. At the trial in the Circuit Court for Arlington County, Virginia, Mr. David Cahoon, testified that he is an attorney admitted to practice in Maryland and that he was then the County Attorney for Montgomery County, Maryland; that he was in private practice in 1964 and that he represented the respondent bank in legal matters and in particular in respect to the action filed by the bank against U. S. Metal Plastics Corporation and petitioner (Tr. 14). He received a telephone call from Mr. Kiley on July 16, 1964, in which Kiley advised him that he was engaged to handle the matter and proposed that if Mr. Cahoon would give him an extension of time to file certain pleadings "he would enter an appearance of those defendants." (Tr. 16) Mr. Cahoon granted Mr. Kiley's request and testified that they both understood that the individual defendant had not been served. (Tr. 16) He denied (Tr. 22-23) that petitioner or anybody acting for him ever took the position, at least until the time his connection with the case was terminated, that Mr. Kiley's actions were unauthorized or

that the Circuit Court of Prince George's County, Maryland, lacked jurisdiction with respect to Mr. Devers. On cross examination (Tr. 25) he testified that Mr. Kiley indicated in the conversation aforesaid that he would enter an appearance by pleading for both parties if Mr. Cahoon would grant the requested extension of ten days to file responsive pleadings. He also stated (Tr. 28) that in conversations prior to the argument on the Motion for Summary Judgment in the Maryland Court he had discussions with Mr. Kiley, that Mr. Kiley made no suggestion indicating that he had not received notice that the Motion would be argued on the 28th and to the best of Mr. Cahoon's recollection he indicated that he was going to appear on that date.

Plaintiff's exhibits numbered 2, 3, 4 and 5, admitted without objection indicated the action taken by Mr. Kiley in the Maryland Court on behalf of both defendants.

Mr. Kiley testified (Tr. 88) that he had no specific recollection of the conversation testified to by Mr. Cahoon in which Mr. Kiley requested the extension of time for filing responsive pleadings. He admitted, in view of the date on which he did file the Opposition to the Motion for Summary Judgment and the accompanying Affidavit, that he would "very probably" have been required to obtain an extension of time and that "if the request was made, it would be made to Mr. Cahoon because he was attorney of record at that time." (Tr. 88)

On page 5 of petitioner's Brief the statement is made that the judgment against U. S. Metal Plastics Corporation and petitioner "was granted *Ex Parte*". This is hardly accurate. Mr. Cahoon testified (Tr. 18) that he received a copy of a notice from the Assignment Commissioner for the Circuit Court of Prince George's County (plaintiff's exhibit 6) that the Motion for Summary Judgment would be heard on Friday, August 28, 1964, that he had conversations with Mr. Kiley about the hearing date (Tr. 19,

20), and Mr. Kiley testified (Tr. 84) that he knew, in view of the filing date of his opposition, that the Motion would mature for hearing on the August Motions Day in that court but that he had "no recollection" (Tr. 83) of having received a notice from the Assignment Commissioner.

It should also be noted that, in addition to appearing at a deposition in aid of execution on the bank's judgment, Mr. Kiley took an active role in seeking to limit the scope of discovery proceedings incident thereto. See plaintiff's exhibits 4 and 5.

It should be noted that nowhere in the record before this Court or otherwise has petitioner set forth any substantive defenses he may have had to the bank's original claim against him on his guarantee.

ARGUMENT

I. PETITIONER HAS FAILED TO ESTABLISH REASONS FOR GRANTING REVIEW OF THE VIRGINIA OPINION.

Petitioner has failed to establish special and important reasons for granting review of the Virginia decision. Rule 19(1)(a) of the Rules of this court sets forth the general nature of cases in which this court will grant review on a writ of certiorari to a state court. Those cases in general must involve the decision of a federal question of substance not heretofore determined by this Court or in a way probably not in accord with applicable decisions of this court. Petitioner has failed on both counts.

As early as 1838, this court considered the question of whether a judgment was valid where no service of process was made. In that case, *Toland v. Sprague*, 12 Pet. 300, 9 L.Ed. 1093 (1838), it was determined that

there was no valid service of process on the appellant. The court continued:

> "The next inquiry is, whether the process of attachment having issued improperly, there has anything been done which has cured the error. And we think that there is enough apparent on the record to produce that effect. It appears that the party appeared and pleaded to the issue. . . . Now, this was a personal privilege or exemption which it was competent for the party to waive. The cases of *Pollard v. Wright* (4 Cranch, 421) and *Barry v. Foyles* (1 Peters, 311) are decisive to show that after appearance and plea, the case stands as if the suit were brought in the usual manner. And the first of these cases proves that an exemption from liability to process, and that in the case of foreign attachment too, is a personal privilege, which may be waived, and that appearing and pleading will produce that waiver. 12 Pet. at 330.

It is clear that the basic legal question presented by this case is neither undetermined nor was it decided in a manner not in accord with applicable decisions of this court.

The remaining issues are essentially factual and, as such, have been fully determined by the courts below. The transcript of trial gives a clear and descriptive account of the transactions leading up to and following the Maryland judgment. The finder of fact rightfully found that the Maryland court had jurisdiction over petitioner and gave that judgment full faith and credit, as indeed it must. U. S. Constitution, Art. 4, §8. *Huntington v. Attrill,* 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 (1892). *Insurance Co. v. Harris,* 97 U.S. 331, 24 L.Ed. 959 (1877).

II. THE COURT BELOW DID NOT ERR IN AFFIRMING THE LOWER COURT JUDGMENT

A. The Maryland Rules of Procedure, in Rule 124(a), state that an appearance may be made by filing any pleading. The entry of petitioner's appearance was accomplished by the filing of the Opposition to the Motion for Summary Judgment and the Affidavit in support thereof (Plaintiff's Exhibits 2 and 3).

A general appearance in an action at law, in Maryland, amounts to a waiver by the defendant of his right to object thereafter to the jurisdction of the Court over his person. *Howell v. Bethelehem – Sparrow's Point Shipyard,* 190 Md. 704, 59 A.2d 680 (1948).

Under the law of both Maryland and Virginia it is quite clear that this action on Mr. Kiley's part is presumed to have been authorized by petitioner.

In *Waltzinger, et al. v. Birsner, et al.,* 212 Md. 107, 128 A.2d 617 (1957), the Court held, at page 624:

> "When the appearance of an attorney is entered on record it is considered as done by the authority of the party. A presumption in favor of the authority of the attorney to appear arises from the mere fact of the appearance. The presumption is rebuttable, but the proof necessary to over come it should be full and clear [citations omitted]. This point was not raised until the end of plaintiffs', appellees' case by a motion for a directed verdict filed then and at the close of the entire case. In their brief the appellants cite no authority for this contention. According to 7 C.J.S., Attorney and Client, § 74, p. 833, ordinarily an objection based on want of authority of an attorney should be made promptly or at the earliest

> opportunity and before a plea has been filed. 5 Am. Juris. 309, Section 82, states that the proper method of attacking an attorney's authority to make an appearance is by motion supported by an oath showing *prima facie*, at least, his want of authority."

And in *Nixon v. Rowland*, 192 Va. 47, 63 S.E.2d 757 (1951), the Virginia Supreme Court held that an appearance by a regular attorney is presumed to be authorized but such presumption is rebuttable. The Court's attention is also directed to *Fisher v. March*, 67 Va. 765, 26 Grat. 765 (1875), which held that the evidence was insufficient to overcome the *prima facie* indication furnished by the record itself of the attorney's authority to act on behalf of his client.

B. The foregoing authorities, and the authorities and treatises cited therein, also make it clear that the burden of proof on the party seeking to overcome the impact of the presumption requires clear, satisfactory and convincing evidence.

Petitioner's case clearly fails to meet this test. Respondent's evidence was clear, concise, supported in every detail by the documentary evidence received by the court and inherently plausible and consistent. On the other hand Mr. Kiley's recollection totally failed him about matters which were crucial to the consistency of petitioner's version of the facts. It is utterly implausible that the numerous indications in the pleadings, subse- to judgment, would not have drawn his attention to the fact that plaintiff considered that it had recovered a judgment against both defendants. Several opportunities passed without his noticing this fact or taking any steps to correct the situation. It is even more implausible that petitioner himself would not have authorized counsel to mount an attack on the Maryland judgment when the bank commenced the proceedings against his property in

Page County, Virginia. He made no indication, verbal or written, through counsel or individually, of his contention that the Maryland judgment was void until the answer was filed in the Arlington County suit. It simply surpasses every requisite of credibility that any court should be asked to believe this story. The story is plainly hindsight and afterthought.

There is a rather completely applicable judicial precedent for the rule which should apply in this case as to the adequacy of the evidence necessary to overcome the presumption of authorization that attaches to an attorney's action in a judicial proceeding. In the case of *Bethlehem Steel Corporation v. Devers*, 389 F.2d 44 (4th Cir., 1968), the Court was presented with a strikingly parallel situation. In that case there were two defendants, a corporation and one of its officers. The defendant corporation had ordered certain materials from the plaintiff manufacturer and the officer had personally guaranteed payment of the purchase contract. Payment was not made, and suit was filed by the manufacturer against the corporation and the corporate officer as an individual. Service of process was accomplished against the corporation by service upon one of its officers and an attorney entered a general appearance for the corporate and the individual defendants, filed an answer to the Complaint, prepared responses to interrogatories, answered an Amended Complaint and contested two Motions for Summary Judgment. Ultimately the District Court found that the individual, who had not been personally served, had either given binding authorization to the attorney or had ratified his general appearance by failing to disavow his representation over a period of eighteen months. The United States Court of Appeals for the Fourth Circuit held that the Trial Court's findings, on the basis of which it had entered judgment against the individual and the corporation, were amply supported by the evidence and affirmed the judgment. Addressing

itself to the presumption of authorization upon which the plaintiff relied the Court said:

> "The presumption that an attorney who enters a general appearance has his client's authorization is a strong one. [Citing authorities] To overcome the presumption, the evidence must be clear and convicing, especially where the attack on the presumption is designed to invalidate a judgment." (389 F.2d at 45, 46).

This Court should know that in that case the individual defendant is the same Malcolm B. Devers who is petitioner here. The attorneys involved were the same Wallace Schubert and J. Ambrose Kiley who testified as witnesses in this case and the corporate defendant was the same U. S. Metal Plastics, Inc., named as a defendant in the Court below. In the Bethlehem Steel Corporation case, according to the opinion of the Fourth Circuit, Kiley claimed there, as he did here, that he appeared on behalf of Devers "through 'a marked degree of carelessness' and inadvertence." In that case as in this one Devers did not, in his efforts to attack the judgment of the Court against him, offer any substantive defenses to the plaintiff's claim.

The two cases taken together clearly establish a pattern of activity by these parties and their counsel. It is significant that neither Mr. Kiley nor Mr. Devers could recollect, when questioned on the matter at the trial in this case, whether such an incident had ever happened before.

C. A collateral attack on a judgment is an attempt to impeach the judgment in an action other than that in which it was rendered, as distinguished from a direct attack which is a proceeding instituted for the very purpose of avoiding or correcting a judgment in some particular, and brought in the same action and in the same Court. M.L.E., *Judgments* § 133. This is the law of Maryland. *Maloy v. McLean*, 140 Md. 306, 117 A. 747 (1922).

In that state laches, or the failure to act when action is required, will preclude a collateral attack on a judgment by a defendant contending that this appearance in the case by an attorney was unauthorized. The party seeking to be relieved from a judgment on this ground should move in the matter without delay and as soon as practicable after knowledge of the existence of the judgment is brought home to him; and acquiescence or unnecessary delay is fatal to his right to relief. *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617 (1869).

Where a judgment in the state which rendered it is immune from collateral attack, it is not subject to such an attack in another state. 47 Am. Jur. 2d, 234, Judgments § 1230.

In other words, petitioner would be doomed to failure in an attack upon the judgment on which this suit was brought had that attack been made in Maryland, and in fact did so fail when a motion to vacate this judgment was heard and denied on April 30, 1970, in the Circuit Court for Prince George's County, Maryland.

While counsel for respondent is not aware of authority precisely on the point in Virginia, there is ample authority for the proposition that the right to maintain a collateral attack upon a judgment may be lost by laches, acquiescence, ratification or estoppel. In this connection the Court's attention is respectfully directed to the cases collected, beginning at page 62, in the annotation at 88 *A.L.R.* 12. There is, therefore, ample authority for the theory behind the ruling of the Court below.

It follows that petitioner cannot be heard to complain of a lack of due process in circumstances where for almost three years, with full knowledge that the judgment was being enforced against him, he failed to seek due process in the Maryland Courts where it was clearly available to him.

D. Counsel for respondent cannot understand petitioner's argument with respect to point I in his Brief which is made without citation of any authority to support it. Petitioner appears to be contending that respondent's alternative pleadings were bad and that the court should have required respondent to elect at the start of the trial as to the cause of action on which it would proceed.

Respondent has no quarrel with the authorities cited for the proposition that a cause of action is merged in a valid judgment rendered upon it and that in this case respondent's claim against petitioner on his contract of guarantee had been merged in the Maryland judgment. But in this very proceeding petitioner was clearly attacking the validity of the Maryland judgment and it was this attack which prompted petitioner's alternate pleading, in effect asking for judgment on the original cause of action if the Court should be constrained to hold that the Maryland judgment was for some reason invalid. The inevitable effect of a declaration by the trial court that the Maryland judgment was invalid would have been to nullify any "merger" of the original cause of action in the judgment and it would have retained its status as a viable basis for a claim against the defendant.

The Trial Court clearly proceeded in a correct manner, permitted respondent to prove its case on its first cause of action, the Maryland judgment, and denied respondent relief on its second cause once the validity of the Maryland judgment and its binding effect upon petitioner had been determined.

E. The evidence in the Court below clearly supports the findings and judgment of the Trial Court. It is respectfully submitted that this evidence would have justified a finding that Mr. Kiley's actions on behalf of petitioner were authorized and that petitioner was bound by the judgment for that reason. The evidence more strongly

supports the Court's conclusion that whether or not Mr. Kiley was authorized to do what he did, petitioner clearly slept on his rights after he had ample notice of the claim against him, and, by reason thereof, was barred from challenging the Maryland judgment on the ground he did.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Court's Order of August 6, 1969, was clearly correct and that the petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 178

MALCOLM B. DEVERS,

Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,

Respondent.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 178

MALCOLM B. DEVERS,

Petitioner,

v.

DISTRICT OF COLUMBIA NATIONAL BANK,

Respondent.

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's Order dated October 12, 1970, denying the petition for writ of certiorari to the Supreme Court of Appeals of Virginia and respectfully prays for a rehearing thereof.

GROUNDS FOR REHEARING

The petition for writ of certiorari was denied without opinion. Petitioner submits that the trial court below prejudiced his rights in arbitrarily refusing to require respondent to make an election of the cause of action under which it would proceed. Such an election is founded in the law applicable to this cause in Virginia. The failure of the trial Court to protect petitioner's basic rights in this respect, resulted in a deprivation of his property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

Petitioner further submits that the trial Court below arbitrarily refused to consider valid and substantial evidence presented, that the foreign judgment (Maryland) obtained by respondent against petitioner and sued upon in the Court below (Virginia) was in substance and in fact a void judgment. The trial Court below erroneously and arbitrarily honored the foreign judgment of Maryland in its Court, without subjecting it to the scrutiny of its validity, when the same was validly challenged by petitioner; that such an arbitrary decision by the Court below and the narrow view it accorded to the presumption of the validity of the foreign judgment of Maryland, was of such dimension as to violate petitioner's fundamental rights of due process under the 14th Amendment of the Constitution of the United States. A reasonably careful review of the record in this case can not help but reveal that the foreign judgment of Maryland, sued upon by petitioner in the Court below (Virginia) was void, since originally the Court (Maryland) entering the judgment did not have jurisdiction over the person of the petitioner herein. The record clearly reveals that petitioner was never served with process in Maryland; and the record clearly and abundantly reveals that counsel who entered his appearance for petitioner in Maryland, did so inadvertently and through mistake; and the record further reveals that petitioner never sanctioned nor authorized Maryland counsel to appear for him in that cause.

The utter and literal refusal of the trial Court below to properly equate petitioner's irrefutable evidence, that he was never served with process in Maryland and hence not before that Court, with the law applicable to such circumstances, was clearly error. The failure and refusal of the trial Court below to find the judgment (Maryland) was void, in light of the record, makes manifest a clear violation of petitioner's basic constitutional rights.

Since it is apparent from the record herein, that petitioner never had an opportunity to contest the validity of respondent's claim against him in any trial, in a case in controversy, the trial court below should have granted him that opportunity and right. Failing to afford petitioner its forum as a trial for all issues in his case, violated his fundamental rights and constituted deprivation of his property without due process of law.

POINT I

The respondent herein initiated proceedings in the Circuit Court of Arlington County, Virginia, and chose to amend its pleadings asserting claims for relief against petitioner in Two Counts. Petitioner submits that he responded to both claims asserted against him. In his posture of the trial petitioner properly sought to require respondent to make an election of the cause of action under which it was asserting its claims, but the trial Court refused to require respondent to make such an election.

Since respondent sued on the judgment (Maryland), and the original cause of action was one in contract, the same had been merged in the judgment. This view comports with Virginia law as set forth in the case of *Sands v. Roccer*, 118 Va. 191, decided in 1915. The ruling of the trial Court that the two counts were not inconsistent, but were merely pleadings in the alternative was error. Petitioner was entitled to have the court require respondent to elect which count upon which it was going to proceed. Failure to do so clearly prejudiced petitioner's rights.